

Testamentary Exception to Privilege, Confidentiality

by

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Lawyers sometimes find themselves in the unenviable position of being asked to disclose confidential information received from deceased clients. The impetus for these requests occurs most often when heirs or beneficiaries squabble about the testamentary intentions of the deceased. Without a client to consult, disclosure of deceased client information raises two concerns: attorney-client privilege and client confidentiality.

Attorney-client privilege after death

The general rule is that the attorney-client privilege does not cease upon the client's death. Posthumous exceptions to the privilege are rare. Within the last 15 years, scholars have expressed frustration over the absence of a general posthumous exception, theorizing that the risk of posthumous disclosure would have little chilling effect on client communication. See e.g., C. Mueller & L. Kirkpatrick, *2 Federal Evidence*, sec. 199 (2d ed. 1994); *Restatement (Third) of the Law Governing Lawyers*, sec. 77, comment (d) (ALI 2000). Instead, these scholars advocate a balancing test in which the court weighs the interest of the deceased client's confidentiality against the exceptional need for the information in the litigation.

Some courts have applied this balancing test approach in posthumous privilege cases, creating an exception to the privilege based upon the compelling need for the information in litigation. Nevertheless, it appears that the U.S. Supreme Court put the balancing test approach to rest three years ago, when it quashed the Independent Counsel's attempt to subpoena notes of attorney-client conversations between Deputy White House Counsel Vince Foster and his attorney, James Hamilton, that had taken place nine days before Foster's suicide. *Swidler & Berlin and James Hamilton v. United States*, 524 U.S. 399 (1998).

In rejecting the balancing test approach, the Supreme Court indicated that the only recognized exception in posthumous privilege cases is the testamentary exception. This exception applies only when privileged communications are sought in a dispute between parties who claim an interest through the same decedent, either by testate or intestate succession or by an inter vivos transaction. The justification for this exception is that oftentimes the decedent would have consented to disclosure in order to carry out his or her testamentary desires. See e.g., *Restatement of the Law Governing Lawyers*, sec. 81.

Minnesota has applied the testamentary exception for at least 70 years. *In re Wunsch's Estate*, 225 N.W. 109 (Minn. 1929). The exception recognized under Minnesota law distinguishes between situations involving disputes initiated by heirs or next of kin and those in which third parties seek privileged information to establish a claim against the estate. In the latter, Minnesota law refuses to extend the testamentary exception to third parties seeking access to privileged information. *Wunsch's Estate* at 110.

Posthumous attorney-client privilege disputes under Minnesota law are relatively straightforward. The exception applies when the party compelling disclosure of privileged information is a claimant (e.g., heir,

beneficiary, omitted next of kin) of an interest through the deceased client. In most cases, the lawyer subject to the disclosure request will have no basis to resist disclosure. Because of the testamentary exception, trial courts have little choice other than to apply the exception and order disclosure when someone claiming an interest through the decedent seeks privileged information.

Confidentiality after death

The issues surrounding the confidentiality obligations to deceased clients can be more problematic. Like the attorney-client privilege, the confidentiality obligation continues after the client's death. Rule 1.6, Comment (lawyer's confidentiality obligation continues after termination of employment). See also, *Restatement of the Law Governing Lawyers*, sec. 60, comment (e) (duty of confidentiality extends beyond the death of the client).

Unlike attorney-client privilege, confidentiality issues are more apt to arise outside of the context of litigation—where there is no court to rule upon the applicability of disclosure exceptions. Moreover, the confidentiality exceptions authorizing permissive disclosure under the Rules of Professional Conduct do not address the confidentiality of deceased clients. See Rule 1.6(b).

What happens when an heir, who has not commenced litigation, merely requests or inquires about confidential information (e.g., testamentary desires) of a deceased client? The lawyer could wait until the heir commences litigation and compels disclosure of the information. Yet, what if disclosure would prevent the heir from instituting litigation against the estate? Would it not best serve the deceased client's interests to disclose the information and avoid litigation?

The Rules of Professional Conduct provide little guidance on this issue. The comment to the confidentiality rule (Rule 1.6) postulates that lawyers possess inherent authority to reveal confidential information when "necessary to perform professional employment." Nevertheless, the applicability of this inherent authority to circumstances where the attorney-client relationship has ended and the client is dead appears somewhat dubious. What should a lawyer do when disclosure of confidential information to descendants of a deceased client would further the interests of that client?

Many lawyers in the estate planning area look to the American College of Trusts and Estate Counsel (ACTEC) for assistance with this issue. ACTEC has formulated its own commentaries and annotations to the Rules of Professional Conduct that substantially influence the area of estate planning and trust and estate administration. ACTEC's commentary to the confidentiality rule recognizes that in certain instances a lawyer is authorized to disclose deceased client information, including client communications, relating to a dispositive instrument or even a prior instrument. The *Restatement of the Law Governing Lawyers*, sec. 60, comment (d), advocates a similar stance.

ACTEC advises that confidential information may be disclosed to an interested party, including a potential litigant, after a client's death if the client's personal representative gives consent, or if the decedent had "expressly or impliedly authorized the disclosure." According to the commentary, "implied authority" exists if disclosure of confidential information would "promote the client's estate plan, forestall litigation, preserve assets, and further family understanding of the decedent's intention." Like other confidentiality exceptions, ACTEC cautions that the disclosure should be limited to information the lawyer would otherwise be required to disclose as a witness.

The Director's Office has used the ACTEC view in advising lawyers confronted with requests for confidential information of deceased clients. Where a personal representative has been appointed, the

lawyer should seek the representative's consent after disclosing the benefits of disclosure. If no representative exists, the lawyer should undertake an analysis of the decedent's testamentary intentions, the identity of the person seeking disclosure and the anticipated reasons for seeking the confidential information, to determine whether the implied authority exists for disclosure.

ACTEC's testamentary exception to confidentiality strikes the proper balance between maintaining client confidentiality and preventing unnecessary litigation or disputes where the client presumably would have authorized disclosure if he or she were alive. The exception also promotes the effective and efficient provision of legal services and advice in carrying out the testamentary desires of deceased clients.

The ACTEC Commentaries on the Model Rules of Professional Conduct are located at www.actec.org/pubinfoark/comm/toc.html.